



February 7, 2002

Mr. John Steiner
Division Chief
Law Department
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2002-0583

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158276.

The Austin Police Department (the “department”) received a request for the following information:

1. The tape of the 911 call which Officer B. Armstrong (#3745) responded to on the night of Joel Hernandez’s arrest.
2. A full incident report on the arrest of Joel Hernandez.
3. A list of all officers present at the scene during the course of the incident.
4. Any material relating to your investigation into the incident.
5. Any information on past complaints against, or investigations into, the conduct of Officer B. Armstrong (#3745).

You state that the city has released the “first page” offense report information and an autopsy report relating to the arrestee. You contend that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.119, and 552.130 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

Initially, we address your statement that we allowed the department to withhold the requested 911 tape in Open Records Letter No. 2001-4124 (2001). In Open Records Decision No. 673 (2001), this office stated that a governmental body may continue to withhold information in accordance with a previous decision under section 552.301 of the Government Code so long as the law, facts, and circumstances on which the prior ruling was based have not changed. *See id.* at 6-7 (stating requirements for first type of previous determination under Gov't Code § 552.301(a)). In Open Records Letter No. 2001-4124 (2001), we concluded that the department could withhold the requested 911 tape under section 552.108(a)(1) because this information was shown to be related to a pending criminal investigation. You do not now indicate, nor does it appear to this office, that this same investigation was still pending when the department received the present request for the 911 tape. Thus, there has been a change in the circumstances on which the prior ruling was based, and therefore the department may no longer rely on Open Records Letter No. 2001-4124 (2001) to withhold the 911 tape from disclosure.

Next, we note that in requesting this decision, you did not submit either the 911 tape or the requested complaints and investigations involving the named police officer. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Under section 552.301(e)(1)(D), "[a] governmental body that requests an attorney general decision . . . must . . . not later than the 15th business day after the date of receiving the written request [for information] . . . submit to the attorney general . . . a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested[.]" Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

You state that the department received this request for information on November 14, 2001. The department then had fifteen business days, or until and including December 7, 2001, in which to comply with section 552.301(e)(1)(D). As of the date of this decision, the department has not submitted to this office either the requested 911 tape, complaints, and investigations or representative samples of the information. Thus, with respect to this information, the department has failed to comply with section 552.301. Therefore, this information is presumed to be public and must be released, unless there is a compelling reason to withhold any of the information in question from public disclosure. Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ).

The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).* Section 552.103

is a discretionary exception to disclosure that protects the governmental body's interests and may be waived; this exception does not make information confidential or protect third-party interests.¹ The department waived this exception in failing to comply with section 552.301. *See generally* Open Records Decision No. 630 at 2-3 (1994). The department also raises sections 552.101 and 552.108 with respect to the information in question. These exceptions can provide a compelling reason for non-disclosure under section 552.302.² However, the department has not demonstrated a compelling reason to withhold the information in question under section 552.108. Furthermore, since the department has not submitted either the information in question or representative samples, we have no basis for finding that any of this information is confidential by law. Therefore, we have no choice but to order this information released per section 552.302. If you believe that any of this information is confidential and may not lawfully be released, then you must challenge this ruling in court as outlined below.

Next, we note that the submitted information includes autopsy photographs. Section 11 of article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. In this instance, the photographs depict an arrestee who died while in the custody of the department. Accordingly, the autopsy photographs must be released under section 11 of article 49.25.

¹See Open Records Decision No. 542 at 4 (1990) (governmental body may waive section 552.103).

²See Gov't Code § 552.101 (excepting from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision"); Open Records Decision No. 586 at 3 (1991) (need of a governmental body to withhold information under section 552.108, other than governmental body that failed to timely seek open records decision, may in appropriate circumstances be a compelling reason for non-disclosure).

The submitted information also includes medical records relating to the arrestee. The release of medical records is governed by the Medical Practice Act (the "MPA"), Occ. Code § 151.001 *et. seq.* Section 159.002 of the Occupations Code provides in pertinent part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). The MPA also includes provisions that govern the disclosure of information that it encompasses. *See id.* §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See Open Records Decision No. 598 (1991)*. We have marked the information that is subject to the MPA. The department may not release this information unless the MPA permits the department to do so.

We now address your claim under section 552.108 of the Government Code with respect to the rest of the submitted information. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 applies to the information. *See Gov't Code § 552.301(e)(1)(A); Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); *Open Records Decision No. 434 at 2-3 (1986)*. In support of your claim under section 552.108, you have submitted a letter stating that the Travis County District Attorney's Office is currently reviewing the information in question and that "[t]here remains a possibility that the case may be presented to the Travis County Grand Jury for their review." Based on these representations, we find that you have shown that section 552.108(a)(1) is applicable to the information at issue. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases);

Open Records Decision Nos. 372 at 4 (1983) (section 552.108 may be invoked by any proper custodian of information relating to an incident involving allegedly criminal conduct that is under active investigation or prosecution).

Section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. The department must release basic information, including a detailed description of the offense, even if this information does not actually appear on the front page of an offense or arrest report. See *Houston Chronicle*, 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing the types of information deemed public by *Houston Chronicle*). The department may withhold the remaining information under section 552.108(a)(1).

In summary, the department must release the requested 911 tape, the complaints and investigations involving the named police officer, and the autopsy photographs. The medical records may be released only if the MPA permits the department to do so. The department may withhold the remaining information under section 552.108(a)(1) of the Government Code, but must release basic information under section 552.108(c). As we are able to make these determinations, we need not address the other exceptions you raise.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

³We note that basic information may not be withheld from disclosure under section 552.103. See Open Records Decision No. 597 (1991).

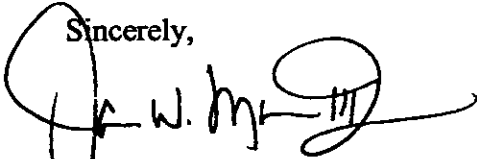
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris III", with a large circular flourish on the left side.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/sdk

Ref: ID# 158243

Enc: Submitted documents & videotape

c: Mr. Jorge G. Pineda
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(w/o enclosures)